ASIA COMMERCIAL FINANCE (M) BHD

v.

DEVELOPMENT & REALTOR SDN BHD & ORS

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CIVIL SUIT NO: 23-332-86]
26 MARCH 2003

CIVIL PROCEDURE: *Amendment - Statement of claim - Application to amend statement of claim to pre-empt a striking off application - Whether allowed*

The plaintiff obtained judgment against the first, second, third and fourth defendants in relation to a loan taken by the first defendant (the borrower) and the rest of the defendants as guarantors. However, the fourth defendant succeeded in setting aside the judgment against him. The fourth defendant thus filed and served an application on the plaintiff to strike out the writ and statement of claim with a supporting affidavit. The plaintiff filed this application to amend the writ and statement of claim to reflect the judgment of this court so as to pre-empt the striking off application, which was dismissed. This was the plaintiff's appeal against the dismissal by the senior assistant registrar (SAR) of the plaintiff's application to amend the statement of claim.

Held:

[1] It was not in dispute that the second, third and fourth defendants had signed the same contract. A perusal of the amended defence filed by the fourth defendant himself showed clear reference to "joint and several guarantees" by the second, third and fourth defendants. Having pleaded his liability as being joint and several the fourth defendant ought to have gracefully conceded to the plaintiff's application and also ought not to have filed an application to strike off the writ and statement of claim. (pp 232 d-e & 233 e, h)

[Appeal allowed.]

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Island Rentals Sdn Bhd & Ors [2002] 2 CLJ 741 HC ***(refd)***

Hong Leong Bank Bhd v. Percetakan Melati Sdn Bhd [2002] 4 MLJ 70 HC ***(refd)***

For the plaintiff - John Clark Sumugod; M/s Sidek Teoh Wong & Dennis
For the defendants - Abdul Fareed Abdul Gafoor; M/s VM Mohan, Fareed & Co

Reported by Suhainah Wahiduddin

a

JUDGMENT

RK Nathan J:

This is the plaintiff's appeal against the dismissal by the learned senior assistant registrar (the SAR) of the plaintiff's application to amend the statement of claim.

b

Facts

The plaintiff filed this claim against the 1st defendant on 18 September 1986 as borrower and as against the 2nd, 3rd and 4th defendants as guarantors of a sum of RM700,000. For the purpose of these proceedings I need not go into
c the details of the case. On 30 July 1987 the plaintiff obtained judgment against all the defendants. However on 30 April 1998 the 4th defendant succeeded in setting aside the judgment against him. The case was set down for trial against the 4th defendant on 7 January 2003 after case management. However on 12 December 2002, the 4th defendant filed and served an application on the
d plaintiff to strike out the writ and statement of claim with a supporting affidavit. The plaintiff filed and served an affidavit in reply to the said application. The said application to strike out was premised on a judgment of this court. Before that application could be heard, the plaintiff filed this application to amend the writ and statement of claim to reflect the judgment of this court so as to
e pre-empt the striking off application. The learned SAR heard both applications on 6 January 2003 and dismissed them both. Both parties then filed their respective appeals and this is the plaintiff's appeal heard, by consent of the parties, prior to the hearing of the defendant's appeal.

Findings Of The Court

f As I said earlier the application of the 4th defendant to strike out the writ and statement of claim was as a result of an earlier decision of this court.

In *Asia Commercial Finance (M) Bhd v. Island Rentals Sdn Bhd & Ors* [2002] 2 CLJ 741 the plaintiff obtained final judgment against the 1st and 3rd defendants and subsequently against the 4th defendant. The said judgment was
g obtained in relation to a loan taken by the 1st defendant with the plaintiff. The 2nd, 3rd and 4th defendants were the guarantors. The 2nd defendant applied to have the action against him dismissed on the ground that as final judgment had been entered against the 1st and 3rd defendants on a joint basis, the cause of action against him had been merged in the said judgment. The 2nd defendant
h argued that the plaintiff was, therefore, estopped from proceeding with the action against him.

I had held in that case that since the 2nd, 3rd and 4th defendants signed the same guarantee, there could be no dispute that it was a joint contract. Each
i joint-contractor has a right to have his co-contractors joined as parties so that

all parties can be before the court. Since final judgment had been entered against the other defendants, I held that the case against the 2nd defendant had merged in the said judgment. Therefore, it was my judgment that there was no case against the 2nd defendant.

Since neither the writ nor the statement of claim had the words "jointly and severally" to denote the joint liability of the guarantors, I had decided accordingly.

In *Asia Commercial Finance* in para. 5 of the statement of claim the plaintiff had pleaded that "the 2nd and 3rd defendant and the deceased agreed jointly and severally the repayment on demand a loan ... ." However it was argued by the 2nd defendant in his application to strike out the claim against him that whilst the plaintiff had pleaded this in para 5 of the statement of claim in the final prayers sought, the plaintiff merely pleaded:

> the outstanding sum due and owing by the 1st, 2nd, 3rd and 4th Defendants to the Plaintiff as at 31st May, 1986 is $363,249.94 together with interest at the rate of 16% per annum with monthly rests. Whereupon the Plaintiff claims:
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> (a) the sum of $363,249.94 as at 31st May, 1986;
>
> (b) interest at the rate of 16% per annum with monthly rests from 1st June, 1986 and overdue interest at 19% per annum with monthly rests until date of payment;
>
> (c) costs;
>
> (d) such further and/or other relief as this Honourable Court deems fit.

It was pointed out by the 2nd defendant that even the order extracted against the 1st and 3rd defendants did not make reference to their joint and several liability.

In *Hong Leong Bank Bhd v. Percetakan Melati Sdn Bhd* [2002] 4 MLJ 70 the facts of the case were as follows:

> The Plaintiff bank provided various loan facilities to the first Defendant pursuant to a loan agreement and debenture and three other charges. By a letter of guarantee, the second to sixth defendants guaranteed the due performance of the loan by the first Defendant. The Plaintiff issued this writ on 3 July 1998 and claimed against all the Defendants under the various loan facilities with interest and costs. All the Defendants entered their appearances on 24 July 1998. The Plaintiff obtained judgment in default of appearance against the fourth Defendant and applied to strike off the defence of all other Defendants. The Plaintiff succeeded against the third and fifth Defendants only. However, to date, the Plaintiff had not extracted the said order. On 2 May

2002, the sixth Defendant applied to strike out the Plaintiff's suit on the grounds that since the second to sixth Defendants had guaranteed the loan and since the Plaintiff had taken judgment against the third to fifth Defendants, the claim against him had merged in the judgment already obtained against the third to fifth Defendants.

In that case I had dismissed the plaintiff's claim against the 6th defendants with costs on the basis that since the second to sixth defendants had signed the same letter of guarantee, there could be no dispute that it was a joint contract. To compound the issue, the plaintiff had not even extracted the judgment obtained against the third and fifth defendants. However, the extracted judgment against the fourth defendant made no mention that the judgment had been obtained against him on a joint and several liability basis. It was a mere judgment against him for the same prayers being sought against the sixth defendant. Since the final judgment had been entered against the three defendants, I had held that there was no cause of action remaining against the sixth defendant.

In the case before me neither the writ nor the statement of claim has the words "jointly and severally liable to the plaintiff" pleaded in respect of the guarantors liability to the plaintiff. It is not in dispute that the 2nd, 3rd and 4th defendants had signed the same contract.

The order obtained against the remaining defendants (encl. 15) reads as follows:

IN THE HIGH COURT IN MALAYA AT PENANG
CIVIL SUIT NO: 23-332-86

Between

Asia Commercial Finance (M) Bhd

Plaintiff

And

(1) Development & Realtor Sdn Bhd
(2) Chew Sin Kok
(3) Chiew Chee Kin
(4) Chew Chee Sun

Defendants

JUDGMENT

THIS 30TH DAY OF JULY, 1987

Pursuant to the Order of Court herein dated the 30th day of July 1987, **IT IS ORDERED** that the Plaintiff be at liberty to enter final judgment against the 1st, 2nd, 3rd and 4th Defendants.

It is this day adjudged that the 1st, 2nd, 3rd, and 4th Defendants do pay the Plaintiff the sum of Malaysian Ringgit Seven Hundred Ninety Four Thousand One Hundred Forty Nine And Cents Twenty Seven Only ($794,149.27) as at 31st August, 1986 together with interest the rate of 16% per annum with monthly rests from 1st September 1986 and overdue interest at the rate of 3% per annum above 16% per annum on instalments of interest in arrears till date of full settlement and costs of his action and the application herein.

ENTERED THE 16th DAY OF October, 1987

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...
SENIOR ASSISTANT REGISTRAR
HIGH COURT,
PENANG

This order although extracted does not refer to the joint and several liability of the guarantors. On authority it would seem that the plaintiff is caught by both my decisions.

This court had to peruse the entire pleadings in order to meet out justice in this case whilst counsel for the plaintiff went off tangent by arguing upon the plaintiff's right to an amendment, and not being caught by time bar. A perusal of the amended defence filed by the 4th defendant himself shows clear reference to "joint and several guarantees" by the 2nd, 3rd and 4th defendants. Para 7A of the amended defence is reproduced and reads as follows:

The Plaintiff's General Manager said Andrew had represented to the 4th Defendant that the security for the said facility were as follows:

(i) the first and primary security for the said facility would be a Registered 1st legal charge over lands held under Lots No. 1142 and 1143, Mukim 12, South West District, Penang;

(ii) joint and several guarantees of the following persons namely:

(a) Chiew Chee Kin

(b) Chew Sin Kok &

(c) Chiew Chee Sun

Having pleaded his liability as being joint and several the 4th defendant ought to have gracefully conceded to the plaintiff's application and also ought not to have filed an application to strike off the writ and statement of claim based on the two decided authorities.

In the circumstances I allow the plaintiff's appeal with costs here and below.